

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & affidavit of mailing

77-1340

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1340

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH JOYCE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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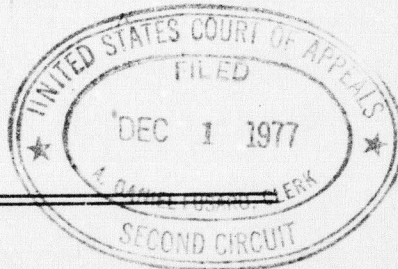




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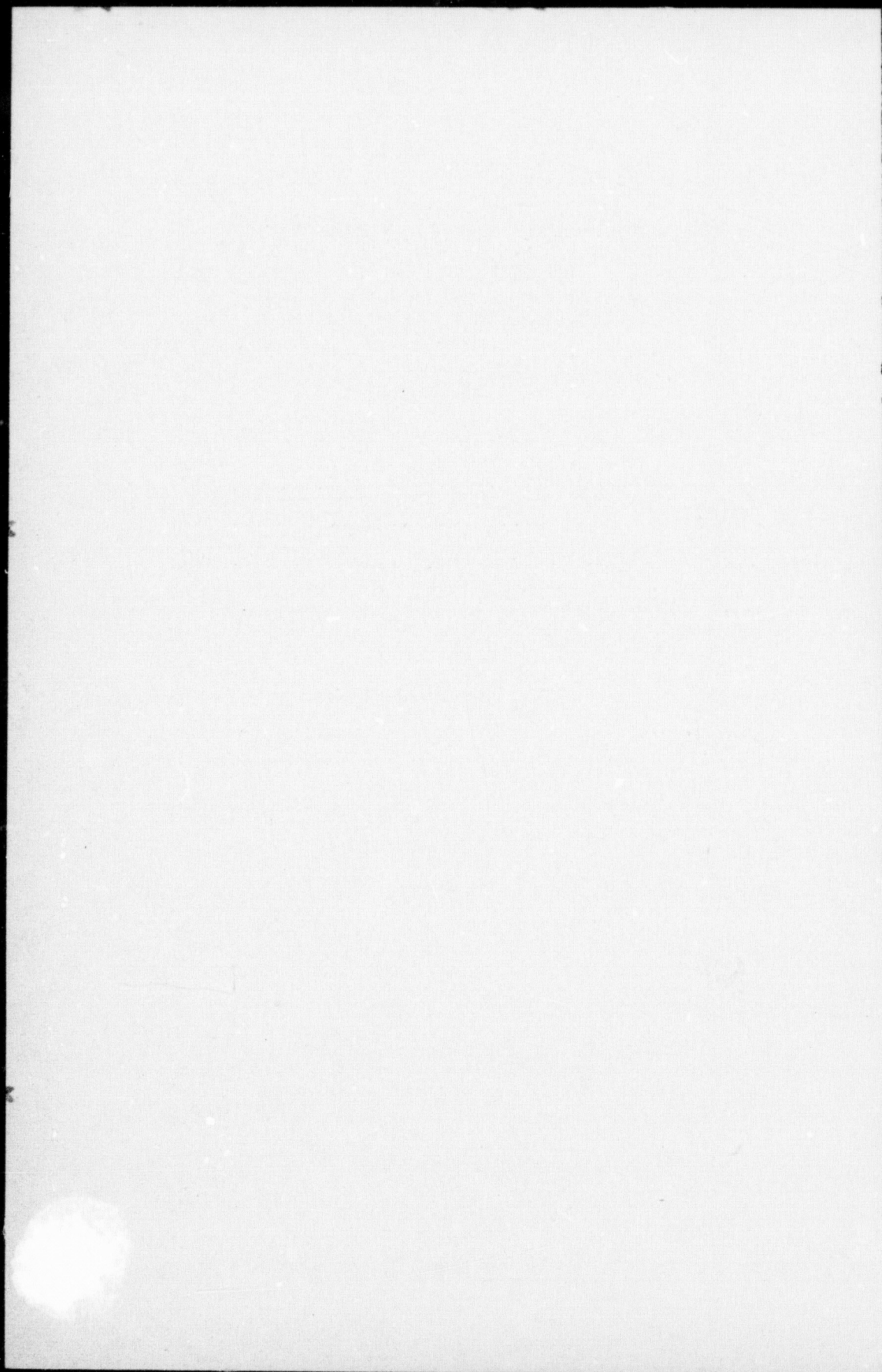
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UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH JOYCE,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Joseph Joyce appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.) entered on July 20, 1977, following a jury trial, convicting him of three counts of mail fraud, in violation of 18 U.S.C. § 1341, and one count of interstate transportation of a fraudulently obtained check, in violation of 18 U.S.C. § 2314, as charged in a six count indictment.¹ Specifically, the mail fraud counts of the indictment under which Joyce was convicted alleged that Joyce, along with Jerome Mackey, Richard Taylor, William Nelson, Lester Fisher and others, as a part of a scheme to defraud prospective distributors of stereo tape recordings, caused an advertising agent to use the mails to place an advertisement in The Philadelphia Inquirer

¹ Joyce was acquitted of the charges (mail fraud) in two of the counts of the indictment.

(Count Three) and caused the mails to be used by two victims of the scheme to send checks to Mackey Distributors, Inc. (Counts Four and Five). The count based on 18 U.S.C. § 2314 charged that Joyce, Mackey, Taylor, Nelson, Fisher and others transported a certified check for \$10,100 obtained by fraud, in interstate commerce (Count Six).² Joyce was sentenced to concurrent terms of five years imprisonment on each count, with six months to be served in jail and the balance on probation, under 18 U.S.C. § 3651. Joyce is presently incarcerated serving the custodial portion of his sentence.

Joyce raises three issues on appeal: *first*, that there was insufficient evidence to support the verdict against him; *second*, that allegedly prejudicial remarks by the prosecutor during summation deprived him of a fair trial; and *third*, that in its charge to the jury, the court committed plain error by failing to explain circumstantial evidence.

Statement of Facts

The Fraud

In the Fall of 1972, Joyce was a salesman for a company called Mackey Distributors, Inc. (hereinafter referred to as "MDI"). Along with other salesmen, Joyce was selling distributorships for stereo tape recordings of popular songs supposedly produced by leading recording companies (such tape recordings being commonly referred to in the trade as "major label" tapes) (111, 131-132, 139).³ As explained by Joyce and other MDI salesmen to prospective distributors, the owner of a distributorship

² The two counts of the indictment under which Joyce was acquitted alleged that, as part of the mail fraud scheme, Joyce and his cohorts used the mails to have advertisements placed in the Boston Globe (Count One) and The Utica Press (Count Two).

³ References are to pages of the trial transcript.

would receive from MDI display pieces, or "cabinets", containing stereo tape recordings. These cabinets would then be placed in various locations in retail establishments such as drug stores, supermarkets and the like. Thereafter, the proceeds of the sales of tapes would be divided between the retail outlets where the tape cabinets were located and the owner of the distributorship. For a minimum investment of about \$2,225.00, MDI offered to each potential distributor ten cabinets each able to hold forty tape recordings (24, 97, 356). MDI also offered to provide assistance in finding locations for the tape cabinets, to provide the initial stock of tape recordings, advertised to be major label tapes, and to restock the cabinets with similar tapes at a cost of about \$2.00 a tape (32, 324, 340). Prospective distributors were regularly given projection sheets showing that if they sold 10 tapes a week, weekly income from each of the ten locations would be \$15.00. They were also told that, to earn this money, only thirty minutes of work per week would be required (33). In addition, prospective distributors were given a list of allegedly successful distributors and were urged to call them (28-30). Prospective distributors were also told that if their cabinet locations were not successful, they would be given new ones (34). Finally, persons contemplating purchasing distributorships were given an "ironclad" guarantee that if they were not satisfied after one year, they would get their investment returned (45-46). If an individual decided to purchase a distributorship, he would sign a contract with MDI.⁴

⁴ Four individuals, William Melleody, Paul Suk, Joanne Connors, and Martin Bovey, who were sold distributorships by Joyce, testified. These witnesses described how they learned about MDI, how they contacted Joyce, the representations Joyce made, and what, if anything they received from MDI after signing contracts with Joyce and paying the full amount due. It was also stipulated

[Footnote continued on following page]

The evidence at trial showed that the representations made in the MDI literature and by Joyce and other salesmen were false. Contrary to what they had been told, the distributor-victims did not receive "major label" tapes. Instead if they were given anything at all they were given duplicate and cut-out tapes.⁵ In addition, MDI failed to provide the number of tapes promised and was of no assistance in finding tape cabinet locations in retail outlets and in furnishing promotional material (48, 78). Thus it was not disputed at trial that a scheme to defraud had existed and that the mail had been used (357).⁶ Rather, the sole issue to be determined was whether or not Joyce knowingly participated in the scheme. The evidence clearly showed that he did.⁷

that if thirteen other persons who had purchased distributorships from MDI through Joyce had testified, they would substantially have repeated the testimony of these witnesses (100). Joyce conceded the accuracy of the distributors' testimony (276).

⁵ Duplicate tape recordings are copies made from original recordings. Cut-out tape recordings are recordings that are no longer selling and have been removed from current circulation by their manufacturers (174, 235-236, 248-251).

⁶ With respect to the mail fraud counts, Alan Nelson, of F and N Advertising testified to the mailing of advertising copy to the Philadelphia Inquirer on behalf of MDI (Count Three) (87); while two of the distributor-victims used the mails to send their checks to MDI; Paul Suk (Count Four) (75) and Joanne Connors (Count Five) (97). In addition, William Melleody's check for a distributorship was carried from Philadelphia, Pennsylvania, to MDI's offices on Long Island (47), thus providing the jurisdictional basis for the charge in Count Six of interstate transportation of a fraudulently obtained check.

⁷ In a trial on a previous indictment, *United States v. Jerome Mackey and William Nelson*, the principals of MDI were convicted of multiple counts of mail fraud. Their convictions were affirmed by this Court in a memorandum decision, *United States v. Jerome Mackey and William Nelson*, — F.2d —, Docket No. 76-1118 (2d Cir., June 23, 1976).

Joyce's Participation in the Fraud

Joyce came to MDI seeking employment as a salesman in August of 1972 (170). At this time, Joyce was experienced. Immediately prior to coming to MDI, he had sold tape distributorships for a company called View Tape, in New Jersey (295). View Tape's operation was substantially the same as MDI (170), except that View Tape did not report to sell major label tapes, but instead sold a private label, Zodiac (307). Joyce had also worked for User Vendors selling distributorships in a "talking vending machine" (297-299), for Taylor Business Institute, as a salesman of one year residence courses in business management (302), and for Wil Mark Service Systems, Inc., selling the services of detective agents (295-296). He also had worked as a salesman for the LaSalle Extension University, a home study school (296).

Joyce's application for employment was made to Lester Fisher, MDI's marketing director.⁸ Fisher interviewed Joyce and, after learning about his prior experience as a tape distributorship salesman at View Tape where Fisher had trained Joyce's supervisor (171), he hired him (169-173).

After hiring Joyce, Fisher made sure that he was familiar with MDI's sales manual, or "pitch book" as it was called (172). Fisher reviewed the material in it with Joyce and told him that while major label tapes would be "pitched", in fact, customers would receive only ten such tapes, the rest being duplicates and cut-outs (173-174). Fisher also told Joyce that one of the so-called references listed in the book was, in reality, his wife (202).

⁸ Fisher was granted immunity and testified for the Government. (168).

Following his indoctrination, Joyce picked the cities he wished to work in, and advertisements were placed in newspapers by MDI in advance of his arrival (119).⁹ While on the road, Joyce would keep in touch with Fisher (175) and would have occasional contact with Richard Taylor, the Vice-president of MDI (118).¹⁰

Joyce's method of sales and the representations which he made were described by the distributor-victims who testified. Martin Bovey of Boston, Massachusetts, learned about MDI from an advertisement in the Boston Globe in early September, 1972. Bovey had previously contracted with another tape company and had not been satisfied with the quality of the tape recordings he had received (235-237). Thus, when Bovey met Joyce, having contacted him through the Boston Globe, he questioned Joyce closely concerning the quality of the tape recordings that MDI would supply and how MDI was able to provide top label tapes at only \$2.00 per tape. Joyce assured Bovey that MDI would supply brand name tape recordings of top current artists (238). Joyce displayed an attractive display case containing thirty to forty brand name tape recordings (234), and, in order to assure Bovey, allowed Bovey to draw up an addendum to the standard MDI contract which provided for the purchase of major label tapes at \$3.00 per tape, about one dollar over the regular price at which MDI offered to sell tapes to its distributors (241-243, 326). Bovey signed the contract and the addendums and paid his money (245). Subsequently, however, when Bovey received his tape

⁹ Thus, as noted above, fn. 6, *supra*, Alan Nelson, of F and N Advertising, used the mails to place an advertisement in the Philadelphia Inquirer on behalf of MDI (Count Three).

¹⁰ Taylor, a Government witness, pleaded guilty to one count of conspiracy to commit mail fraud. He was sentenced to a fine of \$1,000 and put on probation for five years.

cabinets from MDI, he found that they were unlike those shown to him by Joyce and that their contents were "incredibly different from what was on display in [Joyce's] room." (246). Despite vigorous efforts, Bovey was unable to exchange these tapes or to get his money back (247).

Paul Suk of North Quincy, Massachusetts, met Joyce in the middle of September, 1972 after reading an ad in the Boston Globe (66, 71). Suk recalled his meeting with Joyce, where Joyce gave him the MDI sales pitch and remembered Joyce's telling him that he had sold a distributorship to one of the people on the reference list (72).

In response to a request by Suk, Joyce added an addendum to the Suk contract stating that MDI would provide Suk with three hundred additional tapes, to be selected from the top ten tapes listed in "Billboard", the weekly newspaper of the recording industry (73-74).¹¹ Joyce told Suk that this provision would not cause any problem (74). Later, however, upon learning of the Suk addendum, Richard Taylor spoke to Joyce and told him that he was not authorized to make modifications or additions to the standard contract (119, 175). During a conversation around September 15, 1972, Taylor further told Joyce that he should know better than to enter into such agreements because MDI had no intention of delivering merchandise of the quality of top label tapes (128). Suk signed the contract on September 15, 1972, and mailed his check to MDI on Long Island (75) (Count Four). However, he never received the extra tapes provided for in the addendum (78). Moreover, although he contracted for twenty cabinets, Suk received only four

¹¹ While the MDI advertisements spoke of top label tapes, as did Joyce in his sales pitch, the actual contract was silent as to the quality of the tapes (329).

(76), and like Bovey, he was unable to secure the return of any of his investment (78-79).

Joanne Connors of New York Mills, New York, saw an ad for MDI in the Utica Observer Dispatch in September, 1972. As a result, she and her husband drove 90 miles to Albany, New York, to meet with Joyce. The Connors met with Joyce on September 17, 1972, at which time he gave them the MDI sales pitch and displayed some major label tapes (93-95). After the contract was signed, the Connors mailed a check for \$2,225.00 to MDI on Long Island (97) (Count Five).

The last of the four distributor-victims to testify was William Melleody from Philadelphia, Pennsylvania. Mr. Melleody learned of MDI through ads in the Philadelphia Inquirer on October 8th and 15th, 1972 (22). He described Joyce's sales pitch as a "soft-sell" (27). Joyce showed Melleody a cabinet stocked with major label tapes (24). Joyce gave Melleody a list of individuals, for reference purposes, whom he said had purchased tape distributorships from MDI. Joyce falsely added that he himself had sold distributorships to one of the people on the list, a Linda Barclay (29, 173-174). He also told Melleody that he occasionally "got together" with distributors, describing his relationship to them as "like an alumni association" (30-31). Joyce also advised Melleody that he had previously sold another distributor over one hundred locations in Philadelphia, the city where Melleody lived (39) and told him about the professional locators that MDI would provide to locate the tape racks in retail outlets, saying that he knew the locators to be well trained (45). Concerning MDI's guarantee to secure new locations where original ones did not provide adequate sales volume, Joyce told Melleody that he personally knew of some instances where MDI relocated tape racks (46).

Melleody gave Joyce a check for \$10,100 (42), which subsequently was received at MDI's Hempstead offices (49) (Count Six, 18 U.S.C. § 2314). However, Melleody never received any tape recordings, cabinets or professional locators, nor was he able to get his money back (48).

The Defense Case

Joyce testified in his own behalf. The thrust of his defense was an attempt to disassociate himself from the fraudulent activities of MDI. Thus, although Joyce admitted making the representations testified to by the distributors (276), he denied that Fisher ever told him that distributors would only get ten major label tapes, and not the forty per cabinet that he was representing (279). Joyce denied any knowledge of a conspiracy to cheat or defraud distributors (278) and indicated that he too was a victim of MDI (278-279). Joyce stated that during the three months that he worked for MDI, he earned a net of about \$7000 (283).

On cross examination, Joyce testified that he knew that MDI was offering its "top label" tapes for \$2.00 a tape to the distributors (325), while the company he previously worked for, View Tape, was selling its private label tape recordings for \$2.50 (340-341). He never questioned, however, how MDI was able to sell major label tapes for less than View Tape was selling its private brand (341). Joyce denied that Bovey, one of the distributors, questioned him as to how MDI could supply major label tapes at the price at which they were being offered (326). Also, Joyce could not recall why Bovey's contract provided for tape recordings on major labels to be sold for \$3.00 instead of \$2.00 (326).

Finally, Joyce admitted to knowing that Fisher would place advertisements in the newspapers of the cities to

which he was going, but he stated that he did not know how they were placed (336-337). He also stated that he directed Connors and Suk to mail their checks to MDI. (337). On cross examination Joyce was questioned about misrepresentations that he had made to a subsequent employer, Gordon Associates, concerning his salary and tenure at MDI (350-352). Joyce admitted to "exaggerating" his tenure by stating that he worked thirty-five weeks for MDI instead of ten. He also overstated his income by stating that he earned \$39,000 instead of \$9,000 at MDI (352). Besides making these misrepresentations orally, Joyce put them in writing in a letter to Gordon Associates (351). This letter was admitted into evidence over Joyce's objection (350-351).

ARGUMENT

POINT I

The evidence against Joyce was more than sufficient to convict.

On appeal, Joyce concedes the existence of the mail fraud scheme which operated through MDI. He also concedes the use of the mails in furtherance of the scheme and the interstate transportation of the proceeds of the scheme. He argues, however, that there was insufficient evidence to support the jury's finding that *he* was a *knowing* participant in the fraud. He bases his argument on the assertion that the evidence shows he only had a narrow isolated role in the MDI operation and that he only realized limited financial gain from his employment with MDI. We submit that Joyce's contentions are without merit. Indeed, viewing the evidence (including Joyce's own testimony), *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974), and construing all permissible inferences in the light most favorable to the Government, *Glasser v. United*

States, 315 U.S. 60, 80 (1942); *United States v. Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965), it is clear that there was more than sufficient evidence on the basis of which a reasonable juror could have found Joyce guilty. *United States v. Rivera*, 513 F.2d 519, 528-530 (2d Cir.), cert. denied, 423 U.S. 948 (1975); *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States v. Taylor*, 464 F.2d 240, 243-245 (2d Cir. 1972).

The evidence presented during the Government's case established that Joyce had prior experience as a tape recording distributorship salesman, and Lester Fisher, MDI's marketing director, who knew that Joyce's previous job at View Tape involved an operation similar to that at MDI, made sure that Joyce was familiar with the MDI pitch book, which was a basic one used in the industry. Further, Fisher knew Joyce's supervisor at View Tape, a man whom Fisher had previously helped to train in the tape business. Thus, it is clear that Joyce was no newcomer to the tape distributing business. In addition, Fisher recalled telling Joyce that, contrary to the sales pitch, the bulk of the tapes that would be provided to the distributors would not be major label tape recordings. He also told Joyce that one of the individuals on the list of so-called references was in fact his wife. Furthermore, in September of 1972, after Joyce affixed an addendum to the Suk contract, Richard Taylor told Joyce that MDI had no intention of delivering merchandise of the quality of top label tapes, as advertised.

Thus, when Joyce went on the road for MDI, he took with him his background as an experienced salesman in the tape recording distributorship business. In addition, he knew that one of the individuals on his customer reference list was the wife of his superior at MDI and that, as related to him by Lester Fisher, MDI, contrary to the sales pitch which he was to give, would not be furnishing complete cabinets of major label tape record-

ings. Nevertheless, Joyce told Paul Suk that there would be an addendum to his contract providing for three hundred additional tapes, all to be selected from the top ten listings in Billboard Magazine. And thereafter, even though he was reprimanded by Richard Taylor for agreeing to the Suk addendum, he represented to William Melleody that he (Melleody) would receive only brand name tapes of top current artists from MDI. He also told Melleody that he had previously sold a distributorship, which he had not, to Linda Barclay, with whom he had never in fact dealt.

In contrast, however, when testifying in his own behalf, Joyce denied that he was an experienced tape distributorship salesman, that he knew the victims of MDI would not receive the major label tape recordings that he offered, or that he knew the references he supplied were false. He also stated that it was never his practice to contact persons he had previously sold to in order to determine if they were satisfied (305-307), though one distributor-victim, William Melleody, recalled Joyce's reference to get-togethers with distributors, which Joyce characterized as "like an alumni association."¹²

The jury thus had a full opportunity to view Joyce as he testified, to consider his demeanor and to judge his credibility. It was aware from the testimony of the distributors that Joyce was a master of the "soft-sell" and that he was very gracious and congenial. Having listened to Joyce's professions of ignorance of the fraudulent nature of MDI, having weighed his specific denials of knowledge against the representations that he made, and having observed his performance on the stand, the

¹² Joyce was aware that View Tape, his previous employer, was offering its private label tape recordings to its distributors at a greater cost than that at which MDI was offering its supposedly "top label" recordings. But this, he stated, was none of his concern (841).

jury apparently found him not to be credible and his testimony to be fabricated. The inferences that may be drawn from fabricated testimony must be considered, on appeal, in the light most favorable to the Government. *United States v. Tramunti*, *supra*, 500 F.2d at 1338. Thus, where a jury believes that a witness is fabricating, it may discredit his entire story about the innocent purposes of his actions or it may interpret the fabrications as further support for a contrary inference. *United States v. Mariani*, 539 F.2d 915, 920 (2d Cir. 1976). The jury may also infer the negative of disbelieved testimony, unless that inference lacks any independent support in the evidence. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (Learned Hand), *United States v. Jenkins*, 510 F.2d 495, 499 (2d Cir. 1975). Accordingly, the jury could rationally have found Joyce's denials of knowledge so incredible as to add further support to the Government's case.¹³

Furthermore, at his trial, Joyce professed a lack of knowledge concerning the fraud scheme and stated that he "pitched" only what he was told. Yet the distributor-victims testified that Joyce based his representations about the MDI program and its qualities on a good deal of alleged first hand personal knowledge.¹⁴ The making by Joyce of representations which were incorrect and which were falsely alleged to be based on first hand

¹³ Fisher told Joyce that only 10 major label tapes would be provided and Taylor told Joyce, with reference to the Suk Addendum, that MDI would not be supplying major label tapes. Yet Joyce continued to pitch major label tapes.

¹⁴ Joyce stated that he personally sold a distributorship to one of the "singers", Linda Barclay. He stated that he knew, that the "locators" were professionally trained. He stated that he personally knew of a distributor who had benefitted from MDI's guarantees to supply new tape rack locations when an original location proved unprofitable.

knowledge provided a strong basis for the jury's finding of bad faith. Indeed, even false statements merely implying first hand knowledge have been condemned. In *Knickerbocker Merchandising Co. v. United States*, 13 F.2d 544, 546 (2d Cir.), *cert. denied*, 273 U.S. 729 (1926) Learned Hand stated "[s]ome utterances are in such form as to imply knowledge at first hand, and the utterer may be liable, even though he believes them, if he has no knowledge on the subject." Since Joyce admitted that he had no first hand knowledge concerning the success of MDI's distributors, he had no rational basis on which to base his predictions of financial reward. At the very least, the jury could have found that Joyce pitched MDI with a completely reckless indifference to the accuracy of his statements. See *United States v. Love*, 535 F.2d 1152, 1158 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976), *United States v. Amrep Corp.*, 560 F.2d 539, 543-544 (2d Cir. 1977). The jury could also have found that Joyce could have discovered the truth concerning the availability of major label tape recordings at prices below that of private labels by the exercise of reasonable diligence and that his statements concerning the quality of tapes that MDI would deliver were thus made in bad faith. *United States v. Amrep. Corp.*, *supra*, at 546.

Joyce argues that his function was "exceedingly narrow and highly controlled" (App. Brief p. 33), that he learned the MDI pitch by rote and was deliberately kept in the dark as to the truth (App. Brief p. 34-35) and that, in any case, there was nothing inherently fraudulent in his representations (App. Brief 35). This attempt to picture Joyce as victim rather than huckster is an appropriate argument to make to a jury, but it was rejected below. Joyce concedes that he performed a "vital function" (App. Brief p. 32) and, indeed, he did. He, along with the other salesmen, deceived the distributor-victims. He, not Taylor or Fisher, made the false representations. Joyce did not recite the pitch by

rote. He went far beyond the four corners of the contract (328). He made unauthorized additions to the MDI contract, and he falsely based his representations on personal knowledge which he did not have.

Joyce also argues that, unlike Taylor and Fisher, he had no stake in the venture (App. Brief 37). However, he himself testified to the contrary. His sole source of compensation was from commissions (271-272). Failure to make a sale meant not only that Joyce would receive no income, it meant he would not even cover his expenses. Joyce's stake was no less than the officers of MDI.

Thus the jury could find that Joyce knowingly participated in the fraudulent scheme of MDI. The information supplied him by Fisher, the evidence of the impossibility of performance available to Joyce if he were but to use the price information available to him, and the contradictions between his testimony at trial and his representations to the distributor-victims, all supplied a sufficient basis for the jury to find Joyce's bad faith and knowledge.

POINT II

The prosecutor's summation was not plain error.

Joyce argues that the Government's summation contained such improper characterizations and unsubstantiated charges as to deprive him of a fair trial. Specifically, Joyce objects to the prosecutor's comment that he had engaged in a fraudulent scheme at View Tape prior to joining the sales staff at MDI. He also complains of references by the Assistant United States Attorney to admitted misrepresentations by Joyce as to his salary at MDI, which were contained in a letter to a subsequent employer (371-372, 383). We submit that the claim is without merit.

We note at the outset that, at trial, no objection was made to the prosecutor's summation. Thus, on appeal Joyce can only prevail if he can establish that the remarks by the Assistant United States Attorney were so inflammatory and prejudicial as to constitute plain error. *United States v. Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972). This they clearly were not. Indeed, the Government's summation was well within the bounds of proper conduct. The prosecutor did nothing more than comment on the proof before the jury and draw inferences which the evidence permitted, as he was clearly entitled to do. *United States v. White*, 486 F.2d 204, 207 (2d Cir.), *cert. denied*, 415 U.S. 980 (1974).

The characterization of Joyce's previous employment as a "tape scheme" was fully justified by the evidence. View Tape was run by Dave Robinson, a man Lester Fisher had trained at Economy Distributors (171). Economy Distributors pitched major label tapes but sold duplicated tapes and failed to meet its contractual obligations, just as did MDI (182-184). Joyce characterized View Tape's operation as being the same as MDI's when he first met Fisher (172). The prosecutor could thus infer that Joyce was a part of the scheme at View Tape.

Similarly, the references to Joyce's false representations to a subsequent employer were based on direct admissions by Joyce. Joyce admitted that when he applied for work at Gordon Associates he exaggerated, in a letter to his prospective employer, his pay and period of work at MDI (350). In the letter, the admission of which Joyce assigns as error, Joyce asserted that he had earned \$39,000 instead of \$9,000 at MDI and that he had worked for 35 weeks instead of 10 weeks (351). These false representations were made not only in the letter

but also orally when Joyce met his employer (352). This testimony was elicited without objection.¹⁵

Joyce relies on cases such as *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973); *United States v. Guglielmini*, 384 F.2d 602 (2d Cir. 1967), and *United States v. Bugros*, 304 F.2d 177 (2d Cir. 1975) to support his claim of plain error. These cases involved egregious overstepping of the boundaries of propriety by the prosecutor. Yet none of these cases involved plain error. In each case, the defense had objected to portions of the summation and in *Bugros* and *Drummond* there had been repeated admonitions to the prosecutor from the bench that had been ignored. See *United States v. Canniff*, 521 F.2d 565, 572 n.6 (2d Cir. 1976).

POINT III

There was no error in the court's charge to the jury.

Joyce's final claim on appeal is that Judge Weinstein erred in his instructions to the jury. Specifically, he contends that the court incorrectly omitted from its charge an explanation of "the meaning and evaluation of circumstantial evidence" (App. Br. 47). We believe that the contention is without merit.

Prior to instructing the jury, Judge Weinstein gave defense counsel an opportunity to review the entire

¹⁵ The letter was properly admitted as the prior statement of a defendant, Fed. R. Evid. 801 (d) (2), which assisted in establishing his lack of credibility Fed. R. Evid. 608 (b). In addition the letter established that Joyce was making falsehoods (he called them exaggerations) to sell himself just as he sold distributorships. F. Rule Evid. 404. Finally, even if the letter was not itself admissible, the error was harmless because Joyce admitted at trial to the "exaggerations."

charge. Counsel stated that the charge was an "excellent job" and requested no changes (360). The court then proceeded to give its instructions, which contained no language specifically dealing with the difference between direct and circumstantial evidence but which did define reasonable doubt (143-414), which set forth the elements which had to be proven beyond a reasonable doubt (421), and which suggested the types of evidence which the jury could consider in determining Joyce's state of mind (423-426). At the conclusion of the charge, no objection was made to any part of the instruction.

Like the prosecutor's summation no objection was ever made to the judge's charge. Thus, reversal is only required if the court's instructions constituted plain error affecting substantial rights of the accused. *United States v. Pelose*, 538 F.2d 41, 43 (2d Cir. 1976); *United States v. Rosenthal*, 470 F.2d 837, 843-844 (2d Cir.), cert. denied, 412 U.S. 909 (1973). Here, there was no error. The charge was sufficient in all respects. It set forth the elements of the charges (421-422, 429) and the definition of aiding and abetting, including the requisite degrees of knowledge and wilfulness (426-427). It repeatedly stressed the need for the jury to find Joyce a knowing and wilful participant in the scheme (422, 423, 425, 429-400), and it set forth the various defenses to knowledge, e.g., inadvertence, carelessness, negligence, stupidity (425).

Finally, the law is clear that there is no need for a circumstantial evidence charge where the jury is instructed as to reasonable doubt. *Holland v. United States*, 348 U.S. 121, 139-140 (1954). See *Davis v. United States*, 433 F.2d 1222, 1226 n.5 (D.C. Cir. 1970). The cases relied on by Joyce, *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973) and *United States v. Fields*, 466 F.2d 119 (2d Cir. 1972) are inapposite, because they involved the giving of improper and misleading circumstantial

evidence charges rather than not giving such instructions at all.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
November 28, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of December 1977 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Martin Erdmann, Esq. Legal Aid Society, 509 U.S. Courthouse,
Foley Square, New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M Byrd

Sworn to before me this

1st day of December 1977

Barbara Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979